addressed to us on the validity or otherwise of respondent's marriage to the deceased under the customary law of the parties when in fact counsel said he did make such submission. Upon consideration of the submission we do not think that it makes any difference to the conclusion we have already reached in this appeal.

The gist of the counsel's submission is that the respondent's marriage to the deceased was not valid as a secondary wife because she did not fulfil the conditions of secondary wife as stated in *In re Lee Gee Chong (deceased).*[1] He also submitted that the relationship of the deceased with the respondent was a bigamous relationship rendering the deceased liable to be prosecuted for an offence of bigamy under section 494 of the Penal Code. In short, the marriage of the respondent was not valid.

As regards bigamous relationship, the submission was based on an old case of *The King* v. *Sim Boon Lip*[2] wherein it was held that a Chinaman could be convicted of bigamy if the prosecution could prove by Chinese law that the second marriage was void by reason of taking place during the life time of the first wife. In that case the Chinese law which was proved by the prosecution was the law which was in practice and observed in China and the evidence was given by Acting Consul General for China stationed at Singapore. According to this witness whose evidence was accepted by the jury, the Chinese law did not allow polygamy although it permitted concubinage. It was on this basis that the jury found the accused guilty. In our view this case is of doubtful value and cannot be an authority for the proposition that a Chinaman's marriage is monogamous because in a number of cases it was decided in this country a Chinaman can validly take secondary wives besides the principal wife and concubines provided a certain condition is fulfilled. It is sufficient for this purpose to refer to the following two cases. The first case is *Tan Ah Bee* v. *Foo Koon Thye & Anor.*[3] in which Carey J. said:

"It is established that a Chinese man may have as many wives as he may be disposed to. Usually he has a principal wife and may have several secondary wives as well. No precise ceremony of marriage is requisite in the case of a secondary wife, but there must be some evidence of intention and some recognition of the status of wife in order that a secondary marriage may be established."

The second case is *In re Lee Gee Chong (deceased.)*[4] This is the decision of the Federal Court at a time when Singapore was part of Malaysia. In this case Wee Chong Jin C.J. (Singapore) after reviewing exhaustively the cases on the subject summarised the position as follows:

"This judgment clearly lays down that the true principle upon which our courts have for almost a century consistently recognised the custom among the Chinese here of polygamous marriages is to prevent injustice or oppression which would result from a failure to do so."

Thus this is a clear statement of the law that Chinese marriages are not monogamous as accepted in *The King* v. *Sim Boon Lip,* but polygamous. *Sim Boon Lip's* case therefore must be rejected.

The next question is whether the appellant was the secondary wife of the deceased and what evidence must there be in order to constitute her a secondary wife. It now seems settled that all that is necessary to establish the appellant as the secondary wife of the deceased is for her to show that her union with the deceased was intended to be a permanent one. Although no form of marriage ceremony was necessary to create the position or status of a secondary wife, where such formalities were observed they had weight to support the exercise of such position or status.

In this case not only did the parties celebrate their marriage in a restaurant according to the Buddhist rites and registered the same, they also wrote an agreement. It is clear from this agreement in which they described themselves as husband and wife that they intended no other union than a permanent one. The agreement recited that the respondent and the deceased desired to contract a marriage according to Chinese rites and traditions and had mutually expressed their affection for each other. After the marriage was celebrated in December 1952 the parties lived together in Petaling Jaya. Their union was only severed by the death of the deceased in a road accident on December 22, 1960. Their union resulted in the birth of four children. It was never disputed that these children were fathered by the deceased. In our view a union which lasted for so long and produced not one child but four children could not be other than proof of their intention that they desired a permanent union when they signed the agreement in December 1952. Any other conclusion will be to fly in the face of the evidence. Thus such being the case, in our view the union of the respondent with the deceased constituted a valid secondary marriage, and the respondent was therefore a secondary wife of the deceased.

Appeal dismissed.

Solicitors: *G.T. Rajan & Co.; Chooi & Co.*

CHAI YEN v. BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

[F.C. (Lee Hun Hoe C.J. (Borneo), Abdul Hamid F.J. & Abdoolcader J.) March 25 & April 14, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 143 of 1976]

Land Law — Charge of lands — Application for sale of lands charged — Allegations of fraud and undue influence — Annexure to charge not signed by parties — National Land Code. s. 256.

In this case the appellant had executed charges in favour of the respondent and on failure to pay the amount due, the respondent applied for the sale of the lands. The appellant alleged fraud and undue influence and applied for a stay pending the disposal of a suit in regard to a guarantee given by the appellant. The learned trial judge gave judgement for the respondent. The appellant appealed.

Held: in the circumstances of this case the learned judge was justified in finding no basis for the allegations of fraud and undue influence made by the appellant and also in rejecting the contention raised with regard to the consolidation of the accounts. The learned judge was also correct in rejecting the argument that the summons for an order for sale in these proceedings should be stayed pending the disposal

of the suit with regard to the guarantee given by the appellant. The learned judge was therefore justified in making the order for the sale of the lands.

Cases referred to:-

(1) *Bank of America National Trust and Savings Association* v. *Chai Yen* [1980] 1 M.L.J. 198.

(2) *Llewellyn* v. *Earl of Jersey* (1843) 12 L.J. Ex. 243, 246.

(3) *Lyle* v. *Richards,* (1866) L.R. 1 H.L. 222.

(4) *Barton* v. *Dawes* 10 C.B. 261, 263, 266.

FEDERAL COURT.

G.T. Rajan (*S.R. Augustin* with him) for the appellant.

K. Thayalan for the respondent.

Cur. Adv. Vult.

Abdoolcader J. (delivering the judgment of the Court): The somewhat chequered history of these proceedings which have ere now already made two successive trips right up to the Privy Council in London and back, one in respect of the respondent's challenge to the procedural validity of this appeal (*Bank of America National Trust and Savings Association* v. *Chai Yen*[1]) and the other in connection with the appellant's application to introduce expert evidence, accounts for the fact that this appeal came on for hearing before us on March 25, 1981 against an order made by Mohamed Azmi J., on September 6, 1976 for the sale of the lands comprised in two charges executed by the appellant in favour of the respondent under section 256(3) of the National Land Code, 1965 ('the Code') which provides that on any application for an order of sale by a chargee the court shall order the sale of the land unless it is satisfied of the existence of cause to the contrary.

The appellant executed a charge in favour of the respondent ('the first charge') on Lot 703 in the Mukim of Petaling on April 20, 1971 which was registered on April 21, 1971 and originally stamped to cover the sum of $40,000 but later stamped up to various times and finally to secure the sum of $970,000. The appellant also executed another charge in favour of the respondent ('the second charge') on Lot 3775 in the Mukim of Bentong on September 26, 1974 which was registered on November 30, 1974 and stamped to secure the sum of $970,000. By clause 28 of the annexure to the second charge it was declared and agreed that this second charge was created as collateral security to the first charge and both charges were to secure the repayment of moneys due to the respondent by Valor Electrical & Electronic Co. ('Valor') of which the appellant's husband Siow Ting Yong is the sole proprietor.

After notices of demand and the statutory notices of default in Form 16D under section 254 of the Code were issued and served on the appellant and upon her failure to comply therewith the respondent applied in the usual manner by an originating summons on December 4, 1975 under section 256 of the Code for the sale of the lands relating to the two charges for the recovery of $896,286.79 being the principal and interest due as at March 14, 1975 and for further interest thereon. The summons is supported by an affidavit of Robert A. Lemos, the Assistant Vice-President/Operation of the respondent. The appellant filed two affidavits in this matter and in reply to her first Gan Kah Chai, the Assistant Manager of the respondent, made an affidavit answering her allegations and explaining the position of the transactions and how the amount claimed became due. The learned judge heard the application in chambers on September 6, 1976 when he made an order in terms of the respondent's summons for sale and it is this order which is the subject of this appeal.

Under our rules of procedure any party dissatisfied with an order of a judge made in chambers can apply to him for further argument in court and it is open to the judge to either accede to this request and have the matter so adjourned into court to hear further argument or to certify in writing that he requires no further argument. In this case on an application on behalf of the appellant the learned judge took the latter course and certified accordingly. We mention this as one of the principal grounds of complaint by the appellant is that the matter should have been but was not adjourned into court and the witnesses were not cross-examined and that she was therefore virtually denied justice. We find this contention wholly devoid of substance or merit. After the hearing and order made in chambers it was open to the learned judge on an application on behalf of the appellant to either adjourn the matter into court for further argument or certify that he required no further argument. He certified to the latter effect and thus laid the way open for the appellant to appeal to and ventilate her grievances before this court. At the hearing of the summons itself there was no application made on behalf of the appellant to have the matter heard in court instead of in chambers nor any application whatsoever for the cross-examination of Lemos and Gan on their affidavits or to adduce oral evidence. The learned judge therefore acted properly in dealing with the matter as he did and we find in the circumstances the statement of counsel appearing for her in his written submission that the court's refusal to adjourn the hearing into court has deprived her of the opportunity to establish her case astounding and wholly groundless and misconceived.

The appellant filed an affidavit in reply to that of Lemos raising firstly the question of multiplicity of proceedings as the respondent had instituted an action in the Kuala Lumpur High Court (Civil Suit No. 432 of 1975) against the appellant and two others on the written guarantees by them in respect of advances made to Valor who was also joined as the principal debtor and contends that the subject-matter of both proceedings is identical. If indeed that were so it is surprising to say the least that she makes no reference whatsoever to the charges in question in these proceedings in her defence in that suit which is exhibited to her affidavit. The guarantee executed by her which is the subject-matter of the suit has nothing to do with the present proceedings which involve what is in effect a foreclosure summons for the sale of the lands comprised in the two charges. Clause 10 of the guarantee expressly provides that the guarantee and the respondent's rights under it shall be in addition to and shall not be in any way affected or prejudiced by the respondent holding or taking any

other or further securities, and it is but a matter of sheer commonsense and we need hardly have to say that in the event the appellant is held liable in the suit on her guarantee the proceeds of sale of the lands under the two charges will have to be taken into account and she will certainly not have to pay twice over.

In the course of his address Mr. Rajan for the appellant invited us to examine the copy in the record of the guarantee executed by her which is the subject-matter of the suit and not these proceedings and to say on a visual examination that the figures and letters specifying the amount of the guarantee appearing in paragraph 2 thereof were typed on a different typewriter from that used for the other typewritten portions. How we can assume the role of experts on typewriters is beyond us and that too from a photostat copy of the document in question, quite apart from the fact that this point does not seem to have been raised before the learned judge and indeed requires if at all expert evidence which might perhaps be relevant for the purposes of the suit but not these proceedings. The invitation to us would in any event appear to be an attempt to circumvent the appellant's failure to obtain leave at the appellate stage to introduce fresh evidence as Mr. Thayalan for the respondent tells us from the Bar when Mr. Rajan made this point that the appellant had in fact applied unsuccessfully to the Federal Court for leave to adduce expert evidence for this purpose and leave to appeal to the Privy Council against the refusal was also declined and that the appellant then applied for special leave to the Privy Council to appeal against the order of the Federal Court which again was dismissed when we are told Lord Wilberforce said that he had the previous night examined the document in question with the largest magnifying glass he could lay his hands on but could not detect any difference in the typewritten portion referred to. It is certainly not for us to make any such investigation as Mr. Rajan suggested we do and in any event the guarantee is not the subject-matter under consideration before us.

Mr. Rajan also takes the point that the annexure to the first charge was not executed by the appellant who is therefore not bound by its terms. The fact that it is not signed by the parties does not affect its validity or that of the charge as the charge itself effected by an instrument in Form 16A prescribed under section 242 of the Code expressly provides for the charge to be in accordance with the provisions annexed thereto. There is no mandatory requirement in the Code for the execution of the annexure to a charge and in any event on an application of the maxim *'verba relata hoc maxime operantur per referentiam ut in eis inesse videntur'* (words to which reference is made in an instrument have the same operation as if they were inserted in the clause referring to them), it must be considered to be the same thing as if the terms of the annexure referred to in the charge had been actually inserted in the charge itself, since it was, by operation of this principle, incorporated with it (*Llewellyn* v. *Earl of Jersey*[2] (at page 246); *Lyle* v. *Richards*;[3] *Barton* v. *Dawes*[4] (at pages 263, 266)).

The appellant in her affidavit then contends in respect of the second charge that neither the principal sum of $970,000 nor the amount claimed in the summons was in fact due to the respondent by Valor and that she was induced to sign documents for this charge and blank guarantee forms and ancillary letters and documents by the fraud and undue influence of the 'respondent their servants or agents'. The respondent is a body corporate without any soul or mind or mouth for that matter and must of necessity act through human agency in making false and fraudulent representations and exercising undue influence but the appellant in her affidavit does not specify any one or more persons who in fact had perpetrated the acts complained of. If at all true it would have been the easiest thing for her to do so and when we put this to Mr. Rajan he was unable to give any answer or even tell us from the Bar who the person or persons concerned were. These are therefore no more than bare allegations and we will presently have to deal with the affidavit of Gan in reply thereto. In making all these allegations of fraud and undue influence however she completely forgets that she has not challenged the most important document for the purposes of these proceedings, namely, the second charge she executed, and Mr. Augustin who appeared with Mr. Rajan for the appellant confirms in answer to our query that the validity of both the charges were never challenged. There is an attestation clause in the second charge by a solicitor testifying that the appellant acknowledged to him when executing the instrument that she is of full age, voluntarily executed the instrument and understood the contents and effect thereof which has never been questioned or challenged. The appellant is certainly not alleging that the attesting solicitor exercised any undue influence over her. This point alone would be fatal to and lay to rest the appellant's allegations of fraud and undue influence.

Gan then affirmed an affidavit in reply to the appellant's to set out the respondent's version of the actual position with regard to the transactions that had taken place and after referring to some of the matters we already have adverted to he says that the appellant was actually involved in the operation and management of Valor as the person authorised to operate its bank account with the respondent. This is confirmed by the mandate given to that effect by her husband as the sole proprietor of Valor. He goes on to say that the respondent also extended banking facilities to a business known as Wing Lian Enterprise ('Wing Lian'), the sole proprietor of which was ostensibly a Fu Kok Siew and that the appellant was actively involved in the operation and management of Wing Lian as the person authorised to operate its bank account with the respondent. This again is borne out by a mandate by Wing Lian to the respondent. He further avers that the respondent extended banking facilities to a business known as Syarikat Onn Fai Trading ('Onn Fai'), the sole proprietor of which was ostensibly a Yoong Fook and that the moneys advanced to this firm were secured by a lien-holder's caveat entered by the respondent as a result of the deposit with it of the issue document of title in respect of the land comprising Lot 3775 in the Mukim of Bentong which is the subject-matter of the second charge. He says that in July 1974 routine investiga-

tions into the operation of the accounts of Valor, Onn Fai and Wing Lian disclosed that these three firms were involved in a 'kite-flying' operation and that the actual operators of Onn Fai and Wing Lian were the appellant and her husband Siow and that these two firms were formed solely to facilitate this operation.

Gan then affirms that the appellant and her husband when confronted with this discovery admitted the position so revealed and the respondent was then requested by the appellant and her husband to consolidate the three accounts of Valor, Onn Fai and Wing Lian and treat the consolidated amount as due from and on the account of Valor, the aggregate of the consolidated amount so due as at September 20, 1974 being $970,000. The respondent was prepared to accede to the request if the appellant was prepared to have the first charge stamped up to $970,000 and create a new charge over the land which is the subject-matter of the second charge to secure repayment of the sum of $970,000 by Valor, and the appellant freely and voluntarily agreed to this. The first charge was accordingly stamped up and the second charge duly executed. These averments are substantiated and supported by a letter dated September 26, 1974 from the appellant to the respondent which also confirms the lien-holder's caveat over the subject-matter of the second charge entered by the respondent and by another letter of the same date from the respondent to the appellant which is confirmed at the bottom thereof by both the appellant and her husband and which also *inter alia* sets out terms for the repayment of the total sum of $970,000 due by instalments and the interest payable. The arrangement agreed upon and entered into for the discharge of the principal sum of $970,000 by monthly instalments subject to the respondent's right to demand immediate payment or to alter the terms of repayment and for that amount also to be secured by the first and second charges executed by the appellant was then confirmed in a promissory note executed by the appellant's husband as the sole proprietor of Valor on October 4, 1974. Gan concludes with a denial of the appellant's allegations of undue influence and fraud.

The appellant in answer affirmed a short affidavit merely denying knowing what a 'kite-flying' operation means and, to use her words, 'all the sinister remarks and insinuations' contained in Gan's affidavit. She denies that she ever requested the respondent to consolidate the accounts of Valor, Onn Fai and Wing Lian or that she and her husband ever made any admission as Gan avers and she goes on to say that the consolidation of the accounts of the three firms could not and cannot be done legally unless there were proper novations, as she puts it. These are again bare allegations in denial subject, of course, to the general allegation in her first affidavit that she was induced by the respondent to sign certain ancillary letters and documents by fraud and undue influence. It is significant that her husband has not made any affidavit in support of her allegations in the face of the fact that the letters of September 26, 1974 and the promissory note of October 4, 1974 we have referred to would seem to explain the stamping up of the first charge to $970,000 and the execution of the second charge to cover the same amount and that all this would appear to verify the consolidation of the accounts of the three firms to be taken over by Valor. The amount of the consolidated account has not been questioned or put in issue by the appellant or her husband. If there is any substance in the appellant's denial of the consolidation of the accounts of the three firms we would have expected this to have also come from or at least be borne out by the appellant's husband as the sole proprietor of Valor.

Mr. Rajan in his submission takes the point that the consolidation of the accounts is illegal and contrary to the terms of the charges and an infringement of the provisions of section 241(4) of the Code but when we asked him to read that statutory provision he promptly conceded that it has no relevance whatsoever to the point he seeks to make. Mr. Rajan tells us that the most important point for the appellant is the question of novation, and as we understand him what he is saying is that before the appellant can be liable on the two charges as a result of the consolidation of the accounts of the three firms new charges should have been executed. We regret we are unable to either understand or accept this submission. No question whatsoever of any novation can necessarily or possibly arise in the sense of Mr. Rajan's contention as on a consolidation of the accounts of the three firms by agreement between the parties the aggregate thereof became and formed the amount due on Valor's loan account with the respondent and Valor assumed liability therefor as evidenced by the documents we have mentioned.

The appellant's affidavit in reply to Gan's, as we have said earlier, is a mere denial and gives no satisfactory answer to the documents referred to by Gan unless we revert to the bare, broad and blanket allegations of fraud and undue influence contained in her first affidavit, with no particularity or identity of the person or persons responsible therefor and no cross-examination requested of either Lemos or Gan on their respective affidavits. Confronted with the mandates regarding her operation of the accounts of Valor and Wing Lian and the matter of the lien-holder's caveat over her land entered by the respondent with whom the issue document of title thereto was deposited (which she admits in her letter of September 26, 1974 and which is a necessary prerequisite for the entry of such a caveat under section 330 of the Code) in respect of the advances made to Onn Fai, all she can say in reply is that she was merely the *bona fide* agent of Valor and Wing Lian with limited authority to act for them. She does not attempt to explain or answer the matter of advances by the respondent to Onn Fai or how the lien-holder's caveat in respect thereof came to be entered over her land. She says nothing specific to refute the arrangements Gan alleges were entered into which are substantiated by the documents exhibited in these proceedings.

In all the circumstances we can see no reason to disagree with the learned judge who was in our view wholly correct in holding that the appellant is not the ignorant type suffering from a lack of understanding of the transactions entered into with the respondent she seeks to project as her image in this matter. We

reiterate that if there was any substance in her allegations of fraud and undue influence then what should have been put in issue immediately would be the validity of the second charge and in particular the attestation of her signature by the attesting solicitor. The failure to do so cannot but militate against lending any substance to her attempt by bare allegations of fraud and undue influence to repudiate the transactions entered into and resile from her obligations under the two charges. It is furthermore certainly not without considerable significance that the appellant never raised any allegations of fraud and undue influence when she was served with the notices of demand and the statutory notices of default in Form 16D with regard to the two charges well before the summons for the sale of the lands relating thereto was taken out nor did she deny that the amount claimed in these notices was not the amount due by Valor.

The learned judge was therefore in all these circumstances justified in finding no basis for the allegations of fraud and undue influence made by the appellant and also in rejecting the contention raised with regard to the consolidation of the accounts. He was equally correct in rejecting the argument that the summons for an order for sale in these proceedings should be stayed pending the disposal of the suit with regard to the guarantee given by the appellant. There was therefore every justification for making the order that he did on the summons and in being satisfied of no cause existing to preclude an order for the sale of the lands in question under section 256(3) of the Code.

There were no grounds whatsoever therefore calling for our intervention and on the conclusion of arguments before us we dismissed this appeal with costs and ordered the deposit lodged in court by way of security to be paid to the respondent to account of its costs.

Appeal dismissed.

Solicitors: *G.T. Rajan & Co.; Skrine & Co.*

GANAPATHY CHETTIAR v. LUM KUM CHUM & ORS. MEENACHI v. LUM KUM CHUM & ORS.

[F.C. (Raja Azlan Shah C.J., Chang Min Tat & Abdul Hamid F.JJ.) November 17, 1980 & May 4, 1981]

[Kuala Lumpur — Federal Court Civil Appeal Nos. 30 & 34 of 1980]

Practice and Procedure — Consent orders — Order for sale of land — Application to vary consent order — Consent of parties.

In these cases the registered co-proprietors of a piece of land obtained a consent order for the sale of land by public auction. The public auction proved abortive. The first respondent (applicant in the High Court) applied that the public auction be withdrawn and the parties be at liberty to sell their shares by public treaty. The appellants in these two appeals (the second and third respondents in the High Court) desired to carry on with the auction but alternatively they asked to sell their undivided shares by private treaty. At the hearing of the applications, counsel for the second and third respondents in the High Court said that one of his clients wished to withdraw the prayer for sale by private treaty. The court refused the application to withdraw and an order was made allowing the parties to sell their shares by private treaty. It appeared that the other parties had already sold their shares in the land by private treaty, in anticipation of the consent of the appellants. The appellants appealed.

Held: (1) an order by consent is evidence of a contract between the parties and is binding on all parties to the order all the more so, where there is not the slightest question of any mistake as to facts or law;

(2) since there had been no mistake on the part of any one when the consent order for the sale by public auction was made, the only possible way in which this could be altered would be by the consent of all the parties;

(3) in this case the learned judge was right in holding that it was too late to withdraw the prayer for sale by private treaty and therefore there was the consent of all the parties which gave him jurisdiction to alter the consent order.

Cases referred to:-

(1) *Kinch* v. *Walcott* [1929] A.C. 482.

(2) *Australasian Automatic Weighing Machine Co.* v. *Walter* (1891) W.N. 170.

FEDERAL COURT CIVIL APPEAL NO. 30 of 1980.

T. Ariarajah for appellant.

M. Segaram for the 1st respondent.

K. Thayalan for the 2nd respondent.

R.R. Sethu for the 3rd respondent.

FEDERAL COURT CIVIL APPEAL NO. 34 of 1980.

R.R. Sethu for the appellant.

M. Segaram for the 1st respondent.

K. Thayalan for the 2nd respondent.

T. Ariarajah for the 3rd respondent.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): As the result of unhappy differences between the registered co-proprietors of a piece of land, an application was made by one of them for the sale of the land by public auction. A consent order was made in terms on June 19, 1973. It was duly drawn up and perfected. In the consequential summons for directions, as amended, among the terms and conditions set for the sale, a reserve price, as is usual in such cases, was fixed. There was liberty to apply.

The sale by public auction proved abortive. We do not know the reason, but in all likelihood, the reserve price was set too high.

Next, the first respondent died. Both the second and third respondents and the applicant applied separately to substitute the executors of the deceased owner's estate in the action. The second and third respondents desired to carry on with the auction. Alternatively, they asked to sell their undivided shares by private treaty. The applicant asked, more generally, that the public auction be withdrawn and the parties be at liberty to sell their shares by private treaty.

At the hearing of the two applications, Mr. Ariarajah, counsel for the second and third respondents, advised the court that "his client" (advisedly, in the singular) desired to withdraw the prayer for sale by private treaty. He did not say what his other client wanted. Counsel for the representatives of the first respondent and for the applicant objected to the pro-